No. 06-1613

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IN THE

Supreme Court of the United States

KHALED EL-MASRI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES OF COURT APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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Pursuant to Rule 15.8, Petitioner Khaled El-Masri submits this supplemental brief to apprise the Court of new authority that creates additional conflict and confusion among the lower courts and underscores the necessity for Supreme Court review.

In *In re: Sealed Case,* -- F.3d. --, 2007 WL 2067029 (D.C. Cir. decided June 29, 2007; unsealed July 20, 2007), the Court of Appeals for the District of Columbia Circuit upheld the government's invocation of the state secrets privilege with respect to documents requested during discovery, but denied the government's motion to dismiss the case. The Court reasoned that dismissal was unwarranted because, even without the privileged evidence, the plaintiff could present a prima facie case, and the defendant was not prevented from asserting a valid defense.

The district court, applying the same standard that the Fourth Circuit applied in *El-Masri*, had held that the plaintiff's case must be dismissed because there were "possible defenses" that might be foreclosed without recourse to privileged evidence. *In re: Sealed Case*, 2007 WL 2067029, at *8.[1] In reversing that ruling, the D.C. Circuit explained that dismissal on that ground is appropriate solely when the unavailability of privileged evidence deprives the defendant of a *valid* defense -- not simply a hypothetical one. That is, unless the state secrets privilege results in the elimination of a "meritorious and not merely plausible" defense, a case may not be dismissed. *Id.* at *9. The court elaborated: "Were the valid-defense exception expanded to mandate dismissal of a complaint for any plausible or colorable defense, then virtually every case in which the United States successfully invokes the state secrets privilege would need to be dismissed. This would mean abandoning

[1] For the Court's convenience we have included a copy of the opinion in the Appendix to this brief.

the practice of deciding cases on the basis of evidence . . . in favor of a system of conjecture." *Id.*

In contrast, the Fourth Circuit in *El-Masri* upheld the pleading-stage dismissal of Petitioner El-Masri's case in part because of its assumption that state secrets would deprive the defendants of *possible* defenses:

> If, for example, the truth is that El-Masri was detained by the CIA but his description of his treatment is inaccurate, that fact could be established only by disclosure of the actual circumstances of his detention, and its proof would require testimony by the personnel involved. Or, if El-Masri was in fact detained as he describes, but the operation was conducted by some governmental entity other than the CIA, or another government entirely, that information would be privileged. Alternatively, if the CIA detained El-Masri, but did so without Director Tenet's active involvement, effective proof thereof would require a detailed explanation of how CIA operations are supervised. Similarly, although an individual CIA officer might demonstrate his lack of involvement in a given operation by disclosing that he was actually performing some other function at the time in question, establishing his alibi would likely require him to reveal privileged information.

El-Masri v. United States, 479 F.3d 296, 309 (4th Cir. 2007); *available at* 42a – 43a of the Appendix to the Petition for Writ of Certiorari ("Cert App."). By the court's reasoning, the government was not required to establish that it would be prevented from asserting a valid defense; rather, it was sufficient that the court could imagine scenarios in which the privilege would interfere with potentially available defenses. As the court explained: "We do not, of course, mean to

suggest that any of these hypothetical defenses represents the true state of affairs in this matter, but they illustrate that virtually any conceivable response to El-Masri's allegations would disclose privileged information." Cert App. 43a.

In re: Sealed Case expressly repudiates that mode of analysis: "Just as it would be manifestly unfair to permit a presumption of unconstitutional conduct to run against the defendant when the privilege is invoked, it would be manifestly unfair to a plaintiff to impose a presumption that the defendant has a valid defense that is obscured by the privilege." *In re: Sealed Case*, 2007 WL 2067029, at *9 (internal quotations and citation omitted). In short, the standards applied by the D.C. Circuit and the Fourth Circuit cannot be reconciled. *See id.* at *16 (Brown, J., concurring and dissenting) ("The majority's privileged-defense standard is . . . [a] sharp departure from the other circuits"). This Court should grant the petition for certiorari to resolve this and other uncertainties among the lower courts regarding the proper application and scope of the state secrets privilege.

Respectfully submitted,

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